United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-7357, 9

United States Court of Appeals

FOR THE SECOND CIRCUIT

NOS. 75-7357 AND 75-7359

B P/S

THE HOME INSURANCE COMPANY,

Plaintiff-Appellee,

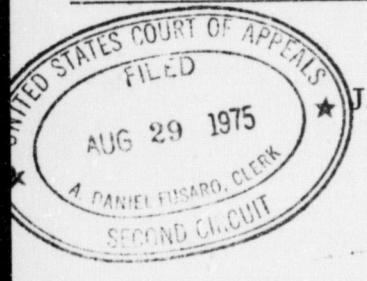
—against—

THE AETNA CASUALTY AND SURETY COMPANY and DIAMOND SHAMROCK CORPORATION,

Defendants-Appellants.

Appeal from the United States District Court For the Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT, THE AETNA CASUALTY AND SURETY COMPANY



J. ROBERT MORRIS
Attorney for Defendant-Appellant The Aetna Casualty and Surety Company
111 Fulton Street
New York, New York 10038
(212) 766-2528

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Judgment Appealed From

This is an appeal from a judgment entered May 13, 1975, granting the motion of the plaintiff-appellee The Home Insurance Company ("Home") for summary judgment and denying the separate cross-motions of the defendant-appellants The Aetna Casualty and Surety Company ("Aetna") and Diamond Shamrock Corporation ("Diamond") (135a-136).* Said judgment was entered upon a decision of Hon. Robert L. Carter whose opinion is reported in Ins. L. Rep. (Fire and Casualty) at 75-792.

* References are to pages in the Appendix.

Issues Presented for Review

1. Was appellant Aetna entitled to a declaratory judgment that for purposes of Aetna's primary insurance policy and Home's excess policy there had been two "occurrences" with respect to damage caused by defective goods which the insured Diamond produced, rather than four "occurrences" as urged by Home?

2. Did the District Court err by failing to resolve in favor of the insured Diamond ambiguities in the insurance policies issued by Home and Aetna to Diamond with respect to the number of occurrences?

3. Did the uncontroverted evidence as to custom and usage within the insurance industry require the District Court to find there had been two occurrences for purposes of Diamond's policies from Aetna and Home?

4. Did the uncontroverted evidence as to the intent and understanding of Diamond and Aetna with respect to the meaning of occurrence as classified by the "batch clause" require the District Court to find that there had been two occurrences for purposes of both policies?

5. Did the affidavits submitted by Aetna, Diamond and Home present issues of fact which precluded the District Court from granting Home's motion for summary judgment?

Statement of the Case

The nature of the case, the course of proceedings and disposition and the relevant facts are set forth in the brief of the appellee Diamond and are adopted by Aetna and will not be repeated herein.

At all times since this dispute arose Aetna and Diamond have been in agreement that the plain meaning and intent

of these policies indicates that there were only two occurrences and that if there were any ambiguity it should be resolved in favor of Diamond. Accordingly, both in the Court below and upon this appeal Aetna and Diamond have the same position with respect to the issues herein.

ARGUMENT

To avoid repetition Aetna adopts and incorporates herein by reference the arguments and citations of authority as set forth in the brief of Appellant Diamond, a draft copy of which Aetna has been furnished by Diamond.

Stated summarily it is Aetna's argument, as more fully developed in Diamond's brief, that:

1. The plain meaning of the term "occurrence" as defined in the Aetna Underlying Policy required the District Court to hold that there had been two occurrences for purposes of the Home Excess Policy and the Aetna policy.

2. Even if the Aetna Underlying policy's definition of occurrence is ambiguous the batch clause requires that there were two-not four-occurrences in this case as clearly intended by the parties to the Underlying Policy

3. Even if it could be concluded that the language in question makes Home's position as reasonable as Diamond's, this ambiguity should be resolved against Home, the insurer, and in favor of Diamond, the insured.

4. The uncontraverted evidence as to custom and usage within the insurance industry required a finding of two occurrences.

5. If this Court find that there is ambiguity and that the rule of *contra proferentem* does not apply then this Court should enter an order denying all motions for summary

judgment since there are issues of fact as to (1) intent in adopting the batch clause and (2) the existence of relevant custom and usage concerning the insurance industry and the batch clause.

CONCLUSION

The decision of the District Court should be reversed, the judgment vacated, and the case remanded with a direction either to enter an order granting Aetna's motion for summary judgment, or, in the alternative, to enter an order denying all motions for summary judgment and to conduct such further proceedings as may be appropriate.

J. Robert Morris
Attorney for Defendant-Appellant The Aetna Casualty and Surety Company
111 Fulton Street
New York, New York 10038
(212) 766-2528

Of Counsel:

Robert A. Dwyer

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